No. 03-847

Supreme Court, U.S.
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In The
Supreme Court of the United States

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Petitioner,

v.

AMERICAN EAGLE AIRLINES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the court of appeals properly applied *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987) to the unique facts of this case?

RULE 29.6 STATEMENT

Respondent American Eagle Airlines, Inc. is a wholly owned corporate subsidiary of AMR Eagle Holding Corp. AMR Eagle Holding Corp. is a wholly owned subsidiary of AMR Corp. None have any non-wholly owned, publicly traded subsidiaries.

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BRIEF IN OPPOSITION

The respondent, American Eagle Airlines, Inc. ("Eagle"), submits this brief in opposition to Air Line Pilots Association International's ("ALPA") petition for a writ of certiorari.

OPINIONS BELOW

Eagle does not object to ALPA's recitation of the court proceedings below, but notes that the district court opinion is published at 197 F.Supp.2d 580.

COUNTER-STATEMENT OF THE CASE

A. Balser's Conduct

Terry Balser was a pilot for Eagle, based at the Los Angeles International Airport. During his employment with Eagle, Balser was subject to multiple internal disciplinary proceedings for inappropriate conduct prior to his termination. (Petitioner's Appendix, p. 50a, hereafter, "App. 50a")

On November 3, 1999, Balser racially harassed Boris Walkoff, a black Eagle employee of Russian and French descent. (App. 49a-50a) Balser taunted Walkoff about the military conflict in Chechnya and showed him a "reverse" swastika that Balser wore around his neck. (*Id.*) Walkoff complained of Balser's misconduct and Eagle investigated. (*Id.*) During the investigation, Eagle learned that Balser had, repeatedly, carried an illegal, plastoid, martial arts knife (called a "dirk") through airport security checks and into cockpits. (App. 51a) A dirk is expressly designed to evade metal detectors and is classified as an illegal weapon under the California Penal Code. (App. 51a-52a) Balser's carrying

his dirk through airport security and onto aircraft was a flagrant violation of federal law, state law, Company rules and policy, and the Collective Bargaining Agreement ("CBA") between Eagle and its pilots. (App. 51a-54a)

B. Eagle's Rules of Conduct

All Eagle employees are bound by Eagle's Rules of Conduct and anti-harassment policies. Rule 10 required Balser to adhere to all relevant security rules. (App. 51a) Rule 34 prohibited Balser from committing criminal offenses, stating that a violation "will be grounds for dismissal." (*Id.*) Rule 36 prohibited possessing a weapon in secured areas, aircraft, or on company property. (*Id.*)

C. Eagle's Investigation

During the investigation, Eagle officials met *twice* with Balser in November 1999 and gave him a full opportunity to "tell his side." (App. 45a) During these meetings, Balser admitted:

- that he had harassed Walkoff by displaying a swastika and making derogatory comments about Walkoff's Russian and French ethnicity;
- that Walkoff could reasonably have been offended by Balser's harassment;
- that he was deeply intrigued by Adolph Hitler and his Nazi philosophies;
- that he kept a photo of himself dressed as Hitler that he showed off to flight crews and that he dressed as Hitler for a Mardi Gras party;
- that he routinely carried his dirk in his flight bag into secured airport areas and onto aircraft.

Los Angeles Chief Pilot McMurtrie conducted Eagle's investigation. (App. 3a-4a) She concluded that Balser should be terminated for harassing a minority employee and for smuggling an illegal dirk into secured areas. (App. 43a-44a) Eagle terminated Balser on November 29, 1999. (App. 43a)

D. The Grievance Proceedings

ALPA grieved Balser's termination on December 8, 1999. (App. 44a) The CBA states that the Company and the Union are to convene a "first-step" hearing within fourteen days of the termination. CBA Section 20.C.1. (App. 47a) The CBA also provides the remedy for a default: "if the Company fails to . . . hold a required hearing within the time limits specified, the pilot and [ALPA] *may consider the grievance denied*" and proceed to full arbitration. CBA Section 20.G.2. (emphasis added) (App. 48a)

That is what happened here. ALPA did not contact Eagle about scheduling a first-step hearing until January 22, 2000, well after the fourteen days contemplated by the CBA had lapsed. (App. 3a) Chief Pilot McMurtrie advised ALPA that because she investigated the charges and made the decision to terminate Balser, she was uncomfortable presiding over the first-step hearing. (App. 44a) Instead, she offered to recuse herself and arrange for a substitute Eagle hearing officer. ALPA refused and invoked its right under §20.G.2 of the CBA to bypass the first-step hearing and proceed to a full arbitration. (App. 44a)

E. Arbitration Proceedings and Findings

Balser's arbitration took place over four days, with thirteen witnesses testifying. (App. 42a-43a) The arbitrator

noted that Balser was afforded due process at the arbitration proceedings: "[f]ull opportunity was given to each party to present evidence, to examine and cross examine witnesses, to state positions and to make arguments with respect to the evidence." (App. 43a) The arbitration award ("the Award") found that Balser "seriously violated" the CBA by racially harassing another Eagle employee and carrying an illegal weapon into FAA security zones and into cockpits. (App. 56a) Regarding his racial harassment, the Award found "Captain Balser's conduct of November 3, 1999 to be a violation of the anti-harassment policy of the Employer." (App. 50a) The Award noted that "[t]he Employer has not only a right but a duty to rid the workplace of such conduct." (*Id.*)

On the weapon issue, the arbitrator found that Balser violated Eagle Rules of Conduct 10, 34, and 36:

> We find the evidence sufficient to support the conclusion that Grievant Balser had reason to believe that he was violating Rule 10, in that he did not make "sure" to observe security rules. We find Sgt. Tarvin's testimony, to the effect that concealed possession of the dirk, violates California Penal Code §12020, sufficiently persuasive to support the conclusion that the Grievant's actions in carrying the dirk in his flight bag falls within the Rule 34 prohibition of "any action constituting a criminal offense."
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> * * *
>
> Rule 36 was violated by the Grievant when he carried the dirk "on company property."

(App. 54a) Violation of either Rule 10 or 36 could support termination. Violation of Rule 34, however, expressly authorized dismissal: "[a]ny action constituting a criminal offense, whether committed on or off duty, ***will be*** grounds

for dismissal." (emphasis added) (App. 51a) Based on these findings, the arbitrator determined that Balser "seriously violated" the CBA. (App. 56a)

Despite these findings, the arbitrator ruled that the lack of a first-step hearing within fourteen days of termination denied Balser due process and violated the CBA. (App. 49a, 56a) The arbitrator reached this conclusion even though the CBA described the consequences if the first-step hearing was not held within fourteen days: Balser's remedy was to proceed to full arbitration on the merits. The arbitrator exceeded his contractual jurisdiction by refusing to enforce the CBA as written.

F. The Arbitration is Vacated

Eagle moved to vacate the Award because (among other things) the arbitrator exceeded his contractual authority by refusing to enforce the Agreement as written. The district court agreed and vacated the Award after it determined that: (1) the arbitrator implicitly found just cause to terminate Balser; and (2) the remainder of the Award, reinstating Balser based upon a post-termination procedural issue, exceeded the arbitrator's contractual authority. (App. 33a-35a) The Fifth Circuit affirmed on the same grounds. (App. 12a-13a) First, the court found that "just cause" existed to terminate Balser because the Award found that he seriously violated the CBA by racially harassing a minority employee and carrying a concealed knife into secured areas of the airport, including the cockpit of aircraft. (App. 13a-15a) Second, the court rejected the conclusion that waiving the post-termination

first-step procedural hearing and proceeding to full arbitration denied Balser due process. (App. 8a-9a, 11a)

REASONS TO DENY THE PETITION

I. This Case Does Not Merit Certiorari Because It Is A Fact Specific Application Of Well-Settled Law.

The Court exercises its discretion to grant certiorari only when a court of appeals has conflicted with other courts of appeal on an "important matter" or "has so far departed from the accepted and usual course of judicial proceeding" that the Court is compelled to exercise its supervisory powers. Sup. Ct. Rule 10(a). "A petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10. ALPA's petition concedes that the court of appeals applied the correct legal standard, but urges review because the standard was not applied correctly to the facts of this case. No legal issue is presented worthy of certiorari.

A. The Fifth Circuit correctly applied *Misco's* principles in this case.

Although arbitrators are given wide latitude to enforce collective bargaining agreements, this latitude is not absolute. In *United Paperworkers Int. Union v. Misco, Inc.*, this Court stated: "An arbitrator may not ignore the plain language of the contract." 484 U.S. 29, 38 (1987). The Court reiterated this principle in *Eastern Associated Coal*: "An arbitrator's award must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice." *Eastern Associated Coal Corp.*

v. Mine Workers, 531 U.S. 57, 61 (2000) (quoting *Misco*, 484 U.S. 29, 38 (1987)). The Fifth Circuit adhered to these longstanding principles in vacating the Award:

> We will not uphold an arbitrator's decision, however, when it dispenses its own "brand of industrial justice" outside the scope of an arbitration agreement. *United Paperworkers Intern. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). Rather, we are free to scrutinize an arbitrator's award "to ensure that the arbitrator acted in conformity with the jurisdictional prerequisites of the collective bargaining agreement." *Delta Queen Steamboat Co. v. District No. 2 Marine Engineers Beneficial Ass'n, AFL-CIO*, 889 F.2d 599, 602 (5th Cir. 1989) (citing *Container Prods., Inc. v. United Steelworkers of Am.*, 873 F.2d 818, 820 (5th Cir. 1989)). And, "[w]here an arbitrator exceeds his contractual authority, vacation or modification of the award is an appropriate remedy." *Delta Queen*, 889 F.2d at 602 (citing *Container Prods.*, 873 F.2d at 820). *See also Houston Lighting & Power Co. v. International Broth. of Elec. Workers, Local Union No. 66*, 71 F.3d 179, 184 (5th Cir. 1995) (if the language of the applicable collective bargaining agreement is "clear and unequivocal, an arbitrator is not free to change its meaning."). In short, an "arbitrator may not ignore the plain language of the contract." *Misco*, 484 U.S. at 38.

(App. 6a-7a)

ALPA objects only to the application of *Misco's* principles to the facts of this case. Certiorari is, therefore, not appropriate.

B. The Fifth Circuit routinely, and correctly, applies *Misco* to affirm labor arbitration awards.

The Fifth Circuit is not a "rogue" court as asserted by ALPA. Instead of subverting *Misco*, the Fifth Circuit exhibits great deference to arbitration awards, refusing to overturn them.[1] Indeed, the Fifth Circuit often has reversed the

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[1] Recent examples of giving deferential treatment to affirm arbitration awards include: *Pioneer Natural Resources USA v. Local 4-487*, 172 LRRM 3062 (5th Cir. 2003) (affirming arbitration award for period before Union was decertified as collective bargaining representative); *Int'l Chem. Workers Union, Local 683c v. Columbian Chems. Co.*, 331 F.3d 491 (5th Cir. 2003) (affirming award because arbitrator neither acted in manifest disregard for the law, nor dispensed his own brand of industrial justice); *Weber Aircraft, Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001) (affirming arbitration award requiring reinstatement); *Atchison, T. & S.F. Ry. Co. v. United Transp. Union*, 175 F.3d 355 (5th Cir. 1999) (affirming arbitration award that required the reinstatement of a railroad yardman based upon arbitrator's factual finding that company's drug testing procedure was inadequate); *UFCW, Dist. Local Union 540 v. Pilgrim's Pride Corp.*, 193 F.3d 328 (5th Cir. 1999) (affirming arbitration award that applied collective bargaining agreement and did not exceed authority under *Misco's* deferential review standard); *National Gypsum Co. v. Oil, Chem., & Atomic Workers Int'l Union*, 147 F.3d 399 (5th Cir. 1998) (affirming arbitration award under *Misco* analysis); *Six Flags Over Tex. v. IBEW, Local No. 116*, 143 F.3d 213 (5th Cir. 1998) (affirming award where arbitrator acted within scope of authority); *United Food & Commercial Workers v. National Tea Co.*, 899 F.2d 386 (5th Cir. 1990) (affirming award where arbitrator acted within scope of authority); *Folger Coffee Co. v. Int'l Union, United Auto., Aerospace & Ag. Workers Local 1805*, 905 F.2d 108 (5th Cir. 1990) (affirming award that drew its essence from collective bargaining agreement); *Smith v. Alumax Extrusions, Inc.*, 868 F.2d 1469 (5th Cir. 1989) (affirming district court denial of motion to vacate); *Dixie Machine Welding & Metal Works, Inc. v. International Brotherhood of Boilermakers, Local 37*, 867 F.2d 250 (5th Cir. 1989); *General Drivers, etc. Local Union 968 v. Sysco Food Services, Inc.*, 838 F.2d 794 (5th Cir. 1988) (finding that

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district court for improperly overturning an arbitration award.[2] There is no need for the Court to intervene to correct any alleged misunderstanding of the well-settled principle of judicial deference to labor arbitration awards.[3]

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arbitrator did not exceed his jurisdiction); *Oil, Chem. & Atomic Workers Int'l Union Local 40288 v. Union Oil Co.*, 125 LRRM 2630 (5th Cir. 1987); *Manville Forest Products Corp. v. United Paperworkers Int'l Union*, 831 F.2d 72 (5th Cir. 1987) (affirming district court's enforcement of arbitration award).

[2] Examples of the Fifth Circuit reversing trial courts to enforce erroneously vacated arbitration awards include: *Weber Aircraft, Inc. v. Gen. Warehousemen & Helpers Union Local 767*, 253 F.3d 821 (5th Cir. 2001) (reversing judgment and enforcing award where reinstating employee did not contradict dominant public policy); *United Food & Commercial Workers v. National Tea Co.*, 899 F.2d 386 (5th Cir 1990) (reversing district court and enforcing arbitration award that was based upon arbitrator's interpretation of contract); *Dixie Machine Welding & Metal Works, Inc. v. International Brotherhood of Boilermakers, Local 37*, 867 F.2d 250 (5th Cir. 1989) (reversing district court and enforcing arbitrator's award interpreting disputed aspects of old contract); *Oil, Chem. & Atomic Workers Int'l Union Local 40288 v. Union Oil Co.*, 125 LRRM 2630 (5th Cir. 1987) (reversing district court and remanding to arbitrator when the arbitrator's factual assumption about repeat drug use was proven wrong).

[3] ALPA asserts, however, that "this case is the latest in a line of Fifth Circuit decisions that have patently misapplied the principles set forth by this Court that limit judicial review of labor arbitration cases." Pet. at 6. There are two responses. First, ALPA failed to disclose that in three of the cases cited, certiorari was denied by this Court:

> *Bruce Hardwood Floors v. UBC, Southern Counsel of Indus. Workers, Local Union No. 2713*, 103 F.3d 449 (5th Cir. 1997), *cert. denied*, 522 U.S. 928 (1997).
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> *Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599 (5th Cir. 1989), *cert. denied*, 498 U.S. 853 (1990).
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> *Houston Lighting & Power Co. v. Int'l Bhd. of Elec. Workers, Local No. 66*, 71 F.3d 179 (5th Cir. 1995), *cert. denied*, 519 U.S. 809 (1996).

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II. Review Also Should Be Denied Because The Fifth Circuit Reached the Correct Result on the Facts of this Case.

A. The lower court correctly reversed the arbitrator for attempting to re-write the Collective Bargaining Agreement.

Contrary to ALPA's argument, the arbitrator did not "construe" the CBA in determining a first-step hearing was required under the CBA. Rather, the arbitrator attempted to re-write the Agreement to justify what he thought was "fair" under the circumstances. The arbitrator exceeded his contractual authority when he flatly ignored the contractual remedy of § 20.G.2, which specifically allowed the parties to forego a first-step hearing. The Award thus does not draw its essence from the CBA.[4] Contrary to ALPA's theory, *Misco* and its progeny do not allow unbridled discretion by the arbitrator. *Misco*, 484 U.S. at 38 ("The arbitrator may not ignore the plain

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This Court has declined certiorari on three previous occasions on issues which ALPA describes as "patent misapplications" of the law. (Certiorari was not sought in the remaining two.) Second, ALPA's effort is peculiar; its apparent disagreement with the result in *those* cases is not a reason to grant *certiorari* in *this* one, a case that correctly set forth the applicable law and is, at most, a fact-specific dispute over the application of that law.

[4] Generally, an award exceeds the scope of the CBA where: (1) the award conflicts with the express terms of the agreement; (2) the award imposes additional requirements that are not expressly provided in the agreement; (3) the award is without rational support or cannot be rationally derived from the terms of the agreement; or (4) the award is based on general considerations of fairness and equity rather than the precise terms of the agreement. *Airline Prof'ls Ass'n v. ABX Air, Inc.*, 274 F.3d 1023, 1030 (6th Cir. 2001).

language of the contract" to dispense his own brand of industrial justice).

B. The lower court correctly limited the "just cause" inquiry to the facts as they existed prior to Balser's termination.

The lower court correctly held that failure to convene a *post-termination* first-step hearing was irrelevant to whether just cause existed to terminate Balser. As the lower court pointed out, "the Supreme Court has held that 'the correctness of a discharge must stand or fall upon the reason given *at the time of the discharge.*'" (App. 12a) (emphasis added) (quoting *Misco*, 484 U.S. at 48 n. 8.). The lower court's ruling does not conflict with decisions of other circuit courts. Each of the cases cited by ALPA deals with a procedural due process violation that occurred ***before*** the employee was terminated, where the worker was not allowed to tell his full story prior to being fired.[5]

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[5] *Tennessee Valley Authority v. Tennessee Valley Trades & Labor Counsel*, 184 F.3d 510, 516 (6th Cir. 1999) (reinstating employee because he was denied due process ***prior*** to discharge); *Federated Dept. Stores v. United Food & Commercial Workers, Union Local 1442*, 901 F.2d 1494, 1497 (9th Cir. 1990) (reinstating employee on due process grounds because he was "denied his right to tell his side of the story" ***prior*** to termination); *Johnston Boiler Co. v. Local Lodge No. 893, Int'l Bhd. of Boilermakers*, 753 F.2d 40, 43 (6th Cir. 1985) (reinstating employee because company refused to provide union "contractually required ***pre-discharge*** meetings") (emphasis added); *Chauffeurs, Teamsters & Helpers Local Union 878 v. Coca Cola Bottling Co.*, 614 F.2d 716, 717 (8th Cir. 1980) (reinstating employee because "he was not afforded an opportunity to tell his side of the story ***prior*** to termination") (emphasis added); and *Safeway Stores, Inc. v. United Food & Commercial Workers Union, Local 400*, 621 F. Supp. 1233, 1238-39

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Here, Balser had a full opportunity to tell his side of the story prior to firing. He (with a union representative) met at least twice with Eagle representatives prior to his termination. (The problem for Balser was that "his side of the story" was damning.) Balser was given full due process prior to termination. After Chief Pilot McMurtrie terminated Balser, ALPA rejected her offer to recuse herself and schedule an alternate first-step hearing officer. ALPA elected to waive the first-step hearing and proceeded to a full arbitration proceeding. Numerous witnesses testified either on Balser's behalf, or were subject to his cross-examination. *See United States Postal Service v. Gregory*, 122 S.Ct. 431, 436 (2001) (if a labor review board's review of the conduct of the employee "is itself adequate, the review . . . is fair").

C. The lower court properly found implied just cause to terminate Balser.

ALPA's claim that there was no finding of just cause in this case is wrong. The arbitrator expressly found that Balser "seriously violated the CBA." Balser violated Eagle policy when he racially harassed a black employee of Russian and French descent. Balser also violated the California Penal Code and Eagle's Rules of Conduct by carrying an illegal (and concealed) knife through security and onto aircraft. Those findings equate to just cause for discharge, as the court of appeals correctly held. *See, E.I. Dupont de Nemours and Co. v. Local 900*, 968 F.2d 456,

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(D.D.C. 1985) (reinstating employee because company failed to disclose all reasons for firing employee prior to termination).

458-59 (5th Cir. 1992) (citations omitted) ("where an arbitrator implicitly finds that just cause exists, he need not recite the operative phrase just cause . . . It is simply a term of art that defines the many unrelated, independent acts that serve as grounds for employment discipline under the agreement.").

"Just cause" is determined by examining the facts as they existed at the date of termination. *Misco*, 484 U.S. at 40 n. 8 ("the correctness of a discharge must stand or fall upon the reason given at the time of discharge."); *Gulf Coast Indus. Workers v. Exxon Company*, 991 F.2d 244, 255 (5th Cir.), *cert. denied*, 510 U.S. 965 (1993) ("[A]n arbitrator [is] to look at the evidence before the employer at the time of discharge.").[6] Just cause existed to terminate Balser on the date Eagle fired him.

CONCLUSION

The court of appeals applied well-settled law to affirm vacating the arbitrator's award. The petition does nothing more than allege a fact-specific misapplication of *Misco*. In fact, there was no misapplication. Although ALPA made no effort to have a preliminary hearing within the fourteen-day period following Balser's termination, he was accorded a full and complete arbitration hearing on the merits.

[6] The lower court found that there was no due process violation. (App. 9a) ("[I]f a first-step hearing does not occur and ALPA invokes arbitration, it has considered the grievance denied within the meaning of Section 20.G.2 and has waived any claim it might have had based on American Eagle's putative procedural default. Accordingly, American Eagle has committed no default of the CBA.").

Because the arbitrator made factual findings amounting to just cause for terminating Balser, the inquiry should have ended, because the arbitrator had no jurisdiction to consider post-termination events. Further, even if the failure to hold a preliminary post-termination hearing was a proper consideration in determining just cause, the arbitrator was not authorized to ignore the provisions of the collective bargaining agreement that permitted the preliminary hearing to be waived so that the parties could proceed to a full arbitration hearing on the merits. For either of these reasons, the Petition should be denied.

Respectfully submitted,

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